In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 323

WALLACE C. FRANKLIN, JR., REGIONAL COUNSEL, WAGE STABILIZATION BOARD, REGION X; JOSEPH A. JENKINS, CHIEF ENFORCEMENT ATTORNEY, WAGE STABILIZATION BOARD, REGION X; T. D. STARNES, ENFORCEMENT COMMISSIONER, 315 WILSON BUILDING, DALLAS, TEXAS, DEFENDANTS-APPELLANTS

v.

JONCO AIRCRAFT CORPORATION, A DELAWARE CORPORATION, OF SHAWNEE, OKLAHOMA, PLAINTIFF-APPELLEE

STATEMENT AS TO JURISDICTION

The Acting Solicitor General, on behalf of the defendants-appellants, and in compliance with Rule 12 of the Supreme Court of the United States, submits herewith a statement particularly disclosing the basis of the jurisdiction of the Supreme Court to review on appeal the judgment entered by the District Court in this case.

OPINION BELOW

The opinion of the three-judge United States District Court for the Northern District of Texas, Dallas Division, is not yet officially reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

The judgment of the district court, specially convened pursuant to 28 U.S.C. 2282, was entered on July 16, 1953. Petition for appeal was presented to that court on August 13, 1953 and rejected, and thereafter, on August 14, 1953, presented to a Justice of this Court. The jurisdiction of the Supreme Court to review herein by direct appeal the judgment is conferred by 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the court below erred in holding Section 405(b) of the Defense Production Act, unconstitutional on the ground that it constituted an unlawful delegation of legislative power.

2. Whether the court below erred in failing to dismiss the complaint on the ground that the plaintiff, here appellee, should have been required to utilize and exhaust its administrative remedy.

3. Whether the court below erred in failing to dismiss the complaint on the ground that the proper party defendants were not named and could not, in fact, be reached in this suit.

4. Whether the court below erred in finding that the wage stabilization enforcement program had

been terminated, as to past violations of wage stabilization orders and regulations, by the termination, on April 30, 1953, of the substantive wage stabilization program itself.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Defense Production Act of 1950 (64 Stat. 798, as amended, 50 U.S.C. App. 2061 *et seq.*) and pertinent regulations issued thereunder are set forth or summarized in the statement and in the text demonstrating that the questions are substantial.

STATEMENT

A. FRAMEWORK PROVIDED BY THE DEFENSE PRODUCTION ACT AND REGULATIONS ISSUED THEREUNDER FOR WAGE STABILIZATION ENFORCEMENT

The primary remedy selected by Congress for the enforcement of wage stabilization policies and regulations, promulgated pursuant to Section 403(b)(5) of the statute (50 U.S.C. App. 2103(b)(5)), is set forth in Section 405(b) which provides (50 U.S.C. App. 2105(b)):

> (b) No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the

costs or expenses of any employer for the purposes of any other law or regulation.[1]

The Act was implemented, both as to control and enforcement provisions, by appropriate delegation of Presidential power in a series of orders and regulations beginning with the issuance, on September 9, 1950, of Executive Order 10161, 15 F.R. 6105, which created the Economic Stabilization Agency. For the purposes of this case, only three of these regulations are of major significance. On July 28, 1952, the Economic Stabilization Administrator promulgated his General Order No. 18 (17 F.R. 6925, 9977) which created the National Enforcement Commission as an independent organ of

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[1] Section 405(b) was derived from Section 5(a) of the Stabilization Act of 1942, 50 U.S.C. App. 965(a). "This subsection adopts the language of the Stabilization Act of October 2, 1942, respecting the penalties to be applied for violations of the wage and salary stabilization program. The committee finds that the disallowance of illegal wage payments as a cost of doing business, for purposes of computing taxes, Government contract payments, and for purposes of establishing price ceilings, was an effective deterrent. * * *" S. Rept. 2250, 81st Cong., 2d Sess., p. 39.

The wage stabilization program under the 1942 Act was carried out by the National War Labor Board under the direction of the Economic Stabilization Director. E.O. 9250, 7 F.R. 7871, October 3, 1942. The stabilization power was extended three times (58 Stat. 643, 59 Stat. 306, 60 Stat. 664) and was terminated by Executive Order 9801, 11 F.R. 13435, on November 12, 1946. The application of administrative sanctions, pursuant to Section 5(a) of the 1942 Act and procedural regulations issued thereunder, to violations of wage stabilization policies and regulations which had occurred prior to November 12, 1946, was continued, by the processing of pending cases and the institution of new proceedings, until completed in 1949. See E.O. 9809, 11 F.R. 14281; United States Treasury Department, *Annual Report of the Commissioner of Internal Revenue, 1949*, pp. 26-27.

the Economic Stabilization Agency and described its organization and functions.[2] Pursuant to Section 4 of this regulation, the National Enforcement Commission was charged with the duty of determining, in cases instituted before it by other constituent organizations of the Economic Stabilization Agency, including the Wage Stabilization Board, whenever wages, salaries or other compensation had been paid in violation of the Defense Production Act. In making this determination, the Commission was directed by Section 4(d) to utilize the policies and standards contained in Economic Stabilization Agency General Order No. 15, 17 F.R. 2994, to be applied in prescribing disallowances under Section 405(b) after a finding of violation. Specifically, after referring to the various areas in which administrative sanctions could be applied, Section 4(b)(1) of General Order 15 provided that the amount to be disallowed would, initially, be the entire amount of the wage paid in violation of the statute, with a further proviso that less than the entire amount could be disallowed upon a showing of extenuating or mitigating circumstances. Section 4(b)(1) also provided, as a matter of "usual and general policy," that the disallowance would at least equal that portion of the payment in excess of the permissible payment.

[2] This re-establishment of the National Enforcement Commission was the last in a series of regulations describing the organization and functions of the enforcement arm of the wage stabilization program. See *e.g.*, 16 F.R. 6028; 16 F.R. 7284; 16 F.R. 10018. The order emphasized the distinction between substantive control and the enforcement program where violations of such control had occurred.

Section 4(b)(2) set forth in detail the circumstances which would be taken as extenuating or mitigating, including prompt disclosure, cooperation with investigating officials, prompt remedying of violations, the avoidance of repetition of violations, and the presence or absence of wilfulness.

These constituted the standards to be employed by the National Enforcement Commission in determining the sanction to be imposed. The procedure to be followed by the Commission was carefully set forth in Revised General Procedural Regulation No. 1, 17 F.R. 7737, effective August 21, 1952. Under this regulation, an enforcement proceeding required a complaint by the prosecuting agency, the right to answer and make appropriate motions, appearance through counsel on the part of respondent, a hearing, of which an official transcript was made, with the right to examine and cross-examine witnesses. Sections 2.1-2.7. Provisions were made for stipulation of facts, the issuance of subpoenas, and the presence of intervenors. Sections 2.7, 3.1, 3.2. The hearings were to be conducted regionally by a designated Enforcement Commissioner to whom proposed findings, recommendations, and briefs were to be submitted. Section 4.1. The Enforcement Commissioner was required to follow and apply the standards of General Order 15, *supra,* and to make his findings and determinations in writing, together with a recommendation as to the appropriate amount of disallowance, if any. Section 4.1. The Enforcement Commmissioner was fur-

ther required to file his findings and determinations with the National Enforcement Commission and to serve copies on the parties. Section 4.1. Equally elaborate provisions were set forth with regard to appeals to the National Enforcement Commission. Section 5.1. If no appeal were taken, the findings and recommendation of the Enforcement Commissioner, in the absence of clear error, were to be adopted by the Commission. Section 4.1(f). If an appeal were taken, the Commission, on the whole record, was empowered to affirm, modify, or reverse the Enforcement Commissioner, to remand the case for further hearing, or to dismiss the complaint. Section 5.2. The findings and determinations of the National Enforcement Commission were to be final. Section 5.2(c). Based on final disposition of the matter or upon stipulation, the National Enforcement Commission was authorized to issue a Certificate of Disallowance, fixing the amount to be disregarded by reason of the wage or salary violation. Sections 6.1, 8.1.[3]

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[3] It should be noted that this enforcement policy and procedure, virtually identical with enforcement practice from the outset of the stabilization program under the 1950 Act, was known to and approved by Congress. In 1951, the same administrative sanction was provided, as an additional remedy, in price violation cases. Section 405(a) of the Defense Production Act, as amended by Section 104(i) of the Defense Production Act Amendments of 1951, 65 Stat. 134. Further, the conference report on the 1952 Amendments to the Act stated that the "* * * conference substitute is not intended to preclude the Board from, as at present, enforcing wage stabilization regulations and policies." H.R. Conf. Rept. 2352, 82d Cong., 2d Sess., p. 24.

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B. FACTUAL BACKGROUND OF THIS CONTROVERSY

Plaintiff-appellee, hereinafter called Jonco, undertook the manufacture of aircraft tools and parts at Shawnee, Oklahoma, in the spring of 1951. Actual operations began in July, 1951, at which time employees were hired and wages were paid. A New Plant Report setting forth interim wage rates, as required by Wage Stabilization Board General Wage Regulation No. 9, Section 3(d), was not filed by Jonco until November 3, 1951. This report, after being perfected, came to the Wage Stabilization Board, Region X, on or about January 24, 1952. Thereafter, on July 2, 1952, the Regional Wage Stabilization Board partially approved and partially modified the interim wage scales and directed the filing of a modified report as to plant employees. After several extensions at Jonco's request, a revised New Plant Report was filed and, on August 29, 1952, the Regional Board approved and revised New Plant Report, subject to certain modifications as to shop classifications. Jonco did not, at that time, cut back its rates to conform to the rates so approved. However, within the time permitted, Jonco filed a petition for reconsideraiton. On November 6, 1952, the Regional Board, with two public members dissenting, approved Jonco's petition for reconsideration and, accordingly, Jonco's interim rate scale in its New Plant Report.

By reason of the dissent of the two public members, the matter was transferred to the Wage Stabilization Board, Washington, D. C., in accordance

with the provisions of General Wage Procedural Regulation No. 1. On February 2, 1953, the Wage Stabilization Committee modified the interim wage rates set forth in Jonco's original New Plant Report.[4] On February 3, 1953, Jonco filed a request for reconsideration by the Wage Stabilization Committee.

On February 6, 1953, Executive Order 10434 was issued. 18 F.R. 809. This order suspended the further administration of regulations and orders issued pursuant to the Defense Production Act of 1950, as amended, with regard to stabilization of wages, salaries, and other compensation. Automatic approval was granted to petitions for approval, based upon agreements, then pending before the Committee. In the case of petitions other than those based upon agreements, notifications were sent out that no further action could be taken in view of the suspension of the program. A letter of this type was sent to Jonco.

Executive Order 10434 specifically provided that it did not "* * * operate to defeat any suit, action, prosecution or administrative enforcement

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[4] On December 6, 1952, the Chairman of the Wage Stabilization Board in Washington resigned and, on the same day, the industry members of the Board also resigned. On December 15, 1952, the Economic Stabilization Administrator designated the remaining public members of the Board as the Wage Stabilization Committee. General Order 19, 17 F.R. 11368. The stated purpose of this order was to provide an interim administration of the wage stabilization program while the Board was rendered inoperative by the resignation of the industry members. The interim administration was to terminate as soon as the Board was again rendered operative by the appointment of industry members.

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proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to * * *" February 6, 1953.

C. THE PROCEEDINGS HEREIN

On April 1, 1953, the Regional Counsel of the Wage Stabilization Board filed a complaint, pursuant to National Enforcement Commission General Procedural Regulation No. 1, *supra*, against Jonco, alleging violations of the Defense Production Act and regulations issued thereunder. Specifically, the complaint, as amended, charged that Jonco had failed to comply with filing requirements between July, 1951 and November, 1951, and, further, that Jonco had failed to modify and adjust rates of pay to 103 shop employees as required by the August 29, 1952 ruling of the Wage Stabilization Board on the New Plant Interim Report. The administrative complaint alleged that this violation continued from August 29, 1952 until February 2, 1953.[5] On May 8, 1953, the National Enforcement Commission in Washington notified Jonco that a hearing would be held before Enforcement Commissioner Starnes in Dallas on May 19, 1953. The hearing was continued, by order of the Commissioner, until May 27, 1953.

[5] As shown above, the regional action of November 6, 1952, was, by reason of the dissent of two public members, transferred to the National Committee which set aside the approval. Where two public members dissented, finality was not accorded to regional action of this type. The case could be automatically transferred to Washington for consideration by the National Committee at the request of the public members.

The instant proceeding was instituted on May 18, 1953, by a complaint seeking to enjoin the holding of the administrative enforcement hearing, and requesting that a three-judge court be convened pursuant to 28 U.S.C. 2284. After referring to the underlying facts, the statute, and certain of the applicable regulations and orders, the complaint alleged that Jonco would suffer irreparable injury by being subjected to an invalid administrative procedure, forced to undergo expense and loss of time in defending itself against the invalid administrative procedure, unlawfully bound without appeal by the decision of the illegal Wage Stabilization Committee, subjected to the possibility of a substantial tax penalty, and threatened by impairment of its credit standing. Jonco charged that Section 405(b) of the Defense Production Act was unconstitutional in that it permitted the exercise of judicial function by the executive branch and imposed a fine or penalty contrary to the Fifth Amendment, and that the fine or penalty was excessive and took Jonco's property without due process of law. Further, the complaint charged that the creation of the Wage Stabilization Committee was unauthorized and contrary to Section 403(b) of the Defense Production Act and that the Committee's decision of February 2, 1953 was invalid. Finally, the complaint charged that the administrative enforcement powers under the wage stabilization program had expired on April 30, 1953.

A temporary restraining order was issued *ex parte* by District Judge Atwell on May 18, 1953, and continued on May 27, 1953, until June 10, 1953, the date set for the hearing on Jonco's application for a preliminary injunction.[6] At the hearing, held on June 11, 1953, the district court indicated that it considered the matter ripe for final disposition. Argument was heard and the court's opinion, Judge Hutcheson dissenting, was announced on July 15, 1953.[7] Essentially the court appears to have held Section 405(b) of the Defense Production Act to be unconstitutional as an unlawful delegation of legislative power. An order permanently enjoining the hearing was entered on July 16, 1953.

THE QUESTIONS ARE SUBSTANTIAL

The decision of the court below destroys the foundation of the wage stabilization enforcement program both as to past and present proceedings. Under Section 405(b) of the Defense Production Act, tax disallowances have already been certified by the National Enforcement Commission in approximately 2,000 cases.[8] In over 400 additional cases, disallowances, stipulated or determined by the Commission, have not yet been certified. Approximately 100 other cases are still being proc-

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[6] A stipulation as to certain of the facts was entered into by the parties on May 25, 1953.

[7] As indicated above, the majority opinion and Judge Hutcheson's dissenting opinion are attached hereto as Appendix A.

[8] We have been advised that, although Section 405(b) permits the use of a variety of administrative sanctions, tax disallowances alone have been used.

essed before the Commission or by negotiation. In these additional cases, the estimated dollar amount is two million dollars.

A multiplicity of tax refund claims and suits will inevitably flow from the decision below if it stands uncorrected, since it declares to be unconstitutional the statutory basis for all past tax disallowances under the wage stabilization program. Applicable statutes of limitations on claims for refund and tax refund suits have not yet run as to most, if not all of the disallowances under the Act of 1950. We believe that decision to be plainly wrong and that the magnitude of the error is underscored if the decision be examined against the background of its far reaching practical impact.

I

Congress Possesses the Power to Utilize Administrative Enforcement and Has Validly Exercised That Power in Section 405(b) of the Defense Production Act.

For the purpose of this heading, we will assume that the constitutional issue was available for decision in the court below. The single sentence dealing with that issue, the core of decision in the court below, is as follows:

> Upon such questions as the delegation of legislative power, there is a line of decisions which classes it unconstitutional. See Carter v. Carter Coal Co., 298 U.S. 238; Panama Refining Co. v. Ryan, 293 U.S. 388. There are no standards with which the President could be guided in determining the policy, or, wishes of Congress.

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We do not read this as meaning that those portions of the Defense Production Act which deal with the prescription of maximum wages and salaries are invalid as unlawful delegations of legislative power. Almost identical provisions and standards, laid down by Congress for guidance in establishing maximum prices, have been sustained by this Court against the charge of unlawful delegation. *Yakus* v. *United States*, 321 U.S. 414. A charge of unconstitutionality on this score would present no substantial question. Cf. *California Water Service* v. *Redding*, 304 U.S. 352, 356.

By necessary inference, then, the court below has applied its holding of unlawful delegation to Section 405(b), *supra*.[9] In view of the argument presented below by plaintiff, the holding could rest on two grounds: First, that Congress lacked power to utilize administrative enforcement, and; second, that Congress failed adequately to provide guidance for the application of the administrative enforcement technique selected. There is, we submit, little substance to either of these views.

Congress may, where it deems the method appropriate, rest the enforcement of statutes up to and including the imposition of sanctions, exclusively with an executive or administrative agency. "* * * Congress has long delegated to executive officers or executive agencies the determination of complicated questions of fact and of law. * * *."

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[9] In a proceeding pursuant to 28 U.S.C. 2282, only an act of Congress is open to attack. *Jameson & Co.* v. *Morgenthau*, 307 U.S. 171, 173.

Switchmen's Union v. *Mediation Board*, 320 U.S. 297, 303; *Estep* v. *United States*, 327 U.S. 114, 120; *Lichter* v. *United States*, 334 U.S. 742. And the availability of this selection of remedy or sanction is not affected by the use, in the enforcement scheme, of a money penalty. "* * * [T]he legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power." *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339; see, also, *Lichter* v. *United States, supra; United States* v. *Ju Toy*, 198 U.S. 253; *Passavant* v. *United States*, 148 U.S. 214. Further, no invalidity attaches to such a Congressional choice because finality is to be accorded to the conclusion reached by the administrative agency. "* * * Apart from constitutional requirements, the question whether judicial review will be provided where Congress is silent depends on the whole setting of the particular statute and the scheme of regulation which is adopted. *Switchmen's Union* v. *Mediation Board*, 320 U.S. 297, 301. And except when the Constitution requires it, judicial review of administrative action may be granted or withheld as Congress chooses." *Estep* v. *United States*, 327 U.S. 114, 120; *Crane* v. *Halo*, 258 U.S.

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142; *Spaulding* v. *Douglas Aircraft Co.*, 154 F. 2d 419, 427 (C.A. 9); *Henrietta* v. *Starling*, 270 U.S. 243; cf. *Textile Mills Co.* v. *Commissioner*, 314 U.S. 326 and *Lykes* v. *United States*, 343 U.S. 118.[10]

Thus, the power of Congress to utilize administrative enforcement in the wage stabilization program is clear. It is equally clear that this is precisely what Congress has done. As indicated above, fn. 1, Congress specifically derived Section 405(b) of the 1950 Act from Section 5(a) of the Stabilization Act of 1942, and the administrative enforcement procedure under the 1950 Act followed the pattern established the administration of the earlier stabilization program. The use of the 1942 statutory enforcement scheme was placed on the express ground that it provided "* * * an effective

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[10] We do not suggest that there is no avenue of judicial review open to Jonco. Determinations that wage regulations have been violated and certification of appropriate deductions would, if supported by evidence, not be subject to reversal. However, constitutional questions and appropriate legal issues could be litigated in tax refund suits. *Woodworth Co.* v. *Kavanagh*, 102 F. Supp. 9 (E.D. Mich.), affirmed, 202 F. 2d 154 (C.A. 6); cf. *Weather-Seal Mfg. Co.* v. *Commissioner*, 16 T.C. 1312, affirmed, 199 F. 2d 376 (C.A.D.C.). As indicated above, fn. 8, the tax disallowance sanction alone has been utilized. If other available sanctions were imposed, *viz.* a contract or renegotiation disallowance, suits could be instituted in the Court of Claims or the Tax Court.

There is, of course, no merit to the apparent suggestion by the court below that the imposition of administrative sanctions must be preceded by court approval or that they must be achieved through judicial enforcement. Aside from the lack of basis for this view in the cases which point to the opposite conclusion, the limitation would destroy the only effective method of wage stabilization enforcement developed during two periods in which national exigencies have made wage stabilization imperative.

deterrent * * *" against violations of wage and salary regulations. S. Rept. 2250, 81st Cong., 2d Sess., p. 39.

There remains only the question whether Section 405(b) furnishes adequate guidance. The text of the statute is sufficient answer. By the first sentence of the section, Congress made illegal the entire wage payment in contravention of a maximum wage regulation. "No employer shall pay, and no employee shall receive, any wage * * * in contravention of any regulation or order promulgated by the President under this title." The second sentence of the section not only provides the method of enforcement, namely, a Presidential directive as to executive or administrative disallowances, but also creates in the President the power to remit some or all of the illegal payment thus prescribed. Specifically, Section 405(b) directs the President to prescribe "* * * the extent to which any wage * * * payment made in contravention * * * shall be disregarded * * *"[11]

Thus, by legislative directive, Congress has declared the entire illegal payment to be forfeit. The President is authorized to select the agency in which

[11] Section 4 of General Order 15, *supra*, precisely follows the language of Section 405(b), reiterating the maximum disallowance, detailing specific extenuating or mitigating circumstances, and establishing a minimum disallowance for violations, as a matter of policy, in the amount of the illegal excess of the payment made in contravention.

There is a striking parallel between this statutory enforcement scheme and the statutory scheme in common use in far more severe circumstances, namely, provisions in criminal statutes which prescribe the maximum sentence and convey a flexible power to impose a lesser sentence.

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the application of the forfeiture is to be made. Further, the President is empowered to remit the penalty to the degree deemed justified in the circumstances of each case.

Adequate guidance is thus clearly furnished for enforcement. Far more flexible standards, suited to and necessary for the implementation of congressional policies, have been sustained. *Lichter* v. *United States, supra; American Power Co.* v. *S.E. C.*, 329 U.S. 90, 104; *Sunshine Anthracite Coal Co.*, v. *Adkins*, 310 U.S. 381; *Federal Trade Commission* v. *Kappel & Bro.*, 291 U.S. 304; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126; *Hampton & Co.* v. *United States*, 276 U.S. 393. Here, as we have shown above, Congress has expressly found that Section 405(b) provides the most, if not the only, effective method of enforcement in a wage stabilization program undertaken in time of national crisis.

II

The Court Below Should Have Dismissed the Complaint as Premature and for Want of Equity

For the purpose of discussion in Point I, we assumed that the constitutional question could properly be reached by the court below. In fact, the complaint should have been dismissed on earlier grounds.

1. As stated by Judge Hutcheson in his dissent below, this proceeding was "* * * nothing more than a premature attack upon an administrative proceeding which is now only in its first stages * * *." In failing to require Jonco to comply with and exhaust the complete administrative procedure set forth in

General Procedural Regulation No. 1, *supra*, the decision below is "at war with the long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51; *McCauley* v. *Waterman Steamship Corp.*, 327 U.S. 540; *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752; *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802; *SEC* v. *Otis & Co.*, 333 U.S. 843 (summarily decided on the basis of the previous cases, at the time of granting of certiorari); *Far Eastern Conference* v. *United States*, 342 U.S. 570.

The considerations of orderly procedure on which the rule is based make obvious its applicability in this case. If the hearing had been permitted, the Enforcement Commissioner might have decided that no violation had occurred or, if a violation had occurred, that no disallowance was warranted by reason of the surrounding circumstances. The matter would here have ended. If, on the other hand, the Commissioner had held that disallowance should be made, Jonco had an appeal as of right to the National Enforcement Commission. The Commission might have sustained any or all of Jonco's defenses. Again, there would have been no need for resort to the courts.

No exception to the rule requiring exhaustion of administrative remedies is created by claims, such as those put forward by Jonco in the court below, of constitutional invalidity or lack of statutory cov-

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erage. On the contrary, this Court has often recognized that exhaustion of administrative procedure may obviate need for judicial consideration of constitutional or statutory issues, a factor emphasizing the soundness of compelling primary recourse to the appropriate administrative tribunals. *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. at pp. 772-773; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. at pp. 50-51.

2. There is a further threshold ground upon which the court below should have dismissed the complaint, Jonco's failure to show irreparable injury.

A showing of irreparable injury is, of course, crucial to the exercise of the equity jurisdiction which was here invoked. And there is no exception with the need for this showing by reason of the fact that the suit is brought to enjoin a proposed governmental proceeding. On the contrary, the doctrine of exhaustion of administrative remedies, discussed and imposed in the cases set forth above, emphasizes the requirement.

The court below found irreparable the injury to lie in the fact that Jonco might, in the future, be subjected to a large penalty or damaging sanction after a final unfavorable decision by the National Enforcement Commission after appeal to it by Jonco.[12] In support of its conclusion that this pos-

[12] The court derived this view from indefinite allegations in an affidavit filed by Jonco's president which conjectures as to the possibility of damage to Jonco if a substantial penalty were to be finally imposed by the National Enforcement Commission.

sibility constituted a showing of irreparable injury, the court below noted the inability of defendants-appellants to guarantee that penalties would not be imposed on Jonco in the future since they had no control over decisions by the National Enforcement Commission.

We submit that the basis accepted by the court below for its finding of irreparable injury demonstrates the exact opposite, namely, that there was no showing of any possible injury to Jonco at all as the result of the holding of the hearing by defendants-appellants or by the purely advisory opinion which might have been issued by the Enforcement Commissioner at the termination of the hearing. It seems perfectly plain, and the court below seems to recognize the fact, that the National Enforcement Commission in Washington alone had power to reach final decision and to certify disallowance. The National Enforcement Commissioners in Washington were not, of course, and could not be made, parties to this proceeding. *Employers Group* v. *National War Labor Board*, 143 F. 2d 145 (C.A. D.C.); *National War Labor Board* v. *Montgomery Ward & Co.*, 144 F. 2d 528 (C.A.D.C.).

The only remaining possibilities with regard to a showing of irreparable injury are set forth in the affidavit by Jonco's president. This affidavit alleges generally the expense, inconvenience and "grief" which will be inflicted on Jonco by the administrative enforcement proceeding. Reference is made to certain losses of orders by Jonco though this loss is not clearly stated to have been caused by the pro-

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posed hearing. Allegations of this type, even if made in more definite form than those contained in the affidavit in this case, do not suffice to sustain the burden of showing irreparable injury. It is well settled that the expense and time consumption attributable to the holding of an administrative hearing, or to any trial, is not recognized by equity as a sufficient basis for injunctive relief. *Petroleum Service Corp.* v. *Public Service Commission,* 304 U.S. 209; *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. at pp. 51-52; *Bradley Lumber Co.* v. *NLRB,* 84 F. 2d 97, 100 (C.A.).

III

The Power to Conduct Administrative Enforcement Proceedings with Regard to Past Wage Stabilization Violations Did Not Expire on April 30, 1953.

The court below observed: "It is also contended, and the contention seems to be correct, that the National Enforcement Commission has not been continued in existence by any executive order after April 30, 1953." This observation was presumably intended to mean, as a possible alternative ground of decision, that the power to continue administrative enforcement with regard to past violations of wage stabilization regulations and orders had been terminated on that date.

The Wage Stabilization Board was created by Title IV of the Defense Production Act of 1950, as amended in 1952, and the power to administer the substantive wage stabilization program was vested in the Board. Section 403(b)(c) and (d),

50 U. S. C. App. 2103(b)(c) and (d), 64 Stat. 807, 66 Stat. 300. The Defense Production Act Amendments of 1952 also specifically provided that "all authority conferred" under Title IV should terminate at the close of April 30, 1953. Section 717(a) of the Defense Production Act of 1950, 50 U. S. C. App. 2166(a), as amended by Section 121(b) of the 1952 Amendments, 66 Stat. 306.[13] Section 717(b)(3) of the 1950 Act, as amended, provided that (50 U. S. C. App. 2166 (b)(3), as amended by the Act of June 30, 1951, 65 Stat. 110):

> Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency.

Certain basic results flowing from the above mentioned statutory provisions are clear. The Wage Stabilization Board was created under Title IV and the substantive wage stabilization power which it has exercised stems from the same title. The substantive power to regulate wages, suspended by Executive Order on February 6, 1953, was terminated by the statute as of April 30, 1953. Agencies created by Congress under Title IV, such as the Wage Stabilization Board, were physically to go out of existence by October 31, 1953.

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[13] As indicated above, Executive Order 10434, 18 F. R. 809, suspended the substantive administration of the wage stabilization program on February 6, 1953. This Presidential suspension was decreed pursuant to authority contained in Section 717(b)(1) of the 1950 Act. 50 U.S.C. App. 2166(b)(1).

In the opinion of the court below, these provisions went further and cut off the administrative enforcement program, under Section 405(b), on April 30, 1953. This conclusion was apparently reached by a literal reading of Section 717(a), as amended in 1952, which terminated, as of April 30, 1953, "* * * all authority conferred * * *" under Title IV.

But the statute itself, as well as its historical background and administrative interpretation, demonstrates that Congress did not intend that violators of the maximum wage provisions before their expiration should be relieved from liability—even though determination of that liability was achieved by administrative action. The termination of authority under Section 717(a) related to the substantive wage stabilization program, the power to prescribe maximum wages by regulation and order, and not to the termination, at an incomplete stage, of the enforcement proceedings with regard to past violations of wage orders. In weighing Congressional purpose on the point, it should be remembered that the enforcement program with regard to price and rent violations continues,[14] although the substantive price and rent control programs have been terminated. There is no reason to believe that Congress had any different intent as to wage order violators.

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[14] The continuation of these enforcement programs is based on Section 706(b), the Savings provision of the 1950 Act and on E.O. 10434, issued on February 6, 1953. Both of these sources are discussed in the text above.

The savings clause, which supports this position (quoted and discussed below), must be read in the light of the similar clause in the 1942 Act upon which it was modelled and the manner in which the latter was applied before the 1950 Act was enacted. Congress expressly patterned the Section 405(b) administrative enforcement remedy, with regard to wage stabilization violations, on Section 5(a) of the 1942 Stabilization Act and the enforcement procedures worked out under that Act. S. Rept. 2250, 81st Cong., 2d Sess., p. 39. In view of this conscious choice, the interpretation and application of the 1942 statute, as to the continuation of enforcement against past violators after suspension of the substantive control program, may be taken as strong evidence of Congressional purpose in the 1950 Act.

The substantive authority under the 1942 Act was terminated by Executive Order in 1946. E.O. 9801, 11 F.R. 13435. The administrative enforcement program against violators of the 1942 Act, prior to its termination, was continued until completed in 1949, and included not only the processing of pending proceedings but also the institution of new proceedings after the suspension of the substantive control program. United States Treasury Department, *Annual Report of the Commissioner of Internal Revenue*, 1949, pp. 26-27; *Annual Report of the Commissioner of Internal Revenue*, 1947, p. 62.[15] The authority pursuant to which the

[15] The function of applying the tax deduction disallowance sanction with regard to violations of the World War II wage

administrative enforcement proceedings were thus completed was the same in effect as that available for completion of administrative enforcement proceedings in the present wage stabilization program. The 1946 Executive Order, after terminating all "effective" wage orders and controls, providing that:

> * * * as to offenses committed or rights or liabilities incurred prior to the date hereof the provisions of such effective orders and regulations shall be treated as still remaining in force for the purpose of sustaining any proper suit, action or prosecution with respect to any such right, liability or offense.

The 1946 Executive Order derived from Section 901(b) of the Emergency Price Control Act of 1942, 56 Stat. 23, 767, which provided:

> * * * except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense.

With full knowledge of the 1942 statutory scheme and enforcement program, Congress provided a

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stabilization program was transferred to the Department of Treasury on December 12, 1946. Section 10(b) of Executive Order 9809, 3 C.F.R. 1946 Supp., p. 185. The Treasury regulation authorizing this tax deduction allowance was in effect when the Defense Production Act of 1950 was enacted and is still in effect today. 26 C.F.R. (Parts 1-79, 1949 Ed.), p. 217.

savings clause, almost identical with that contained in the 1942 legislation, which states (Section 706(b) of the 1950 Act, 50 U. S. C. App. 2156(b)):

> * * * termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder shall not operate to defeat any suit, action, or prosecution, whether theretofore or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order.

The statutory savings clause was implemented by Executive Order 10434 of February 6, 1953, which, after suspending the substantive wage stabilization program, specifically provides that it:

> * * * shall not operate to defeat any suit, action, prosecution, or administrative enforcement proceeding, whether heretofore or hereafter commenced, with respect to any right, liability, or offense possessed, incurred, or committed, prior to this date.

These savings provisions were plainly meant to assure that the termination date of the statute did not free past violators from liability for their misconduct—whether the procedure for ascertaining the fact of violation and imposing the sanction was judicial or administrative. In each case, "* * * any suit, action or prosecution * * *" words plainly understood by Congress to include administrative proceedings, as the prior history shows—is pre-

served for the purpose of reaching violations which occurred prior to the termination of the substantive control program. In each case, no distinction is made with regard to the commencement date of the suit, action or prosecution. Both statutes specifically authorize the institution of enforcement proceedings after, as well as before, the termination of the substantive program, so long as the violations occurred while the maximum wage controls were applicable. In the 1953 Executive Order under the 1950 statute, the draftsman has specifically preserved such proceedings "* * * whether theretofore or thereafter commenced. * * *." The same effect was achieved in the 1942 Act and the 1946 Executive Order by the technique of preserving the existence of regulations or orders for the sole purpose of enforcement.[16]

Even if the 1950 Act be read alone, without regard for its historical context, a reading of Section 717(a) and Section 706(b) together leads to the same conclusion. Section 717(a) terminates "all authority conferred" by Title IV. Section 706(b) provides that the "* * * termination of the authority granted in any title or section of this Act * * * shall not operate to defeat any suit, action, or prose-

[16] The continuing Congressional policy embodied in the General Savings Statute, and the language of that act, 1 U.S.C. 109, would, if applied here, require the same conclusion as that dictated by the materials discussed above. The preservation of "* * * any proper action or prosecution for the enforcement of such penalty * * *" by the General Savings Statute has been held to sustain the application of administrative orders to violations of a substantive jurisdiction which terminated before the administrative sanction was applied. See *Eastern Coal Corp.* v. *NLRB*, 176 F. 2d 131 (C.A. 4).

cution, whether theretofore or thereafter commenced, * * *." Thus, a clear distinction is made between the substantive stabilization program, the "authority conferred" by Title IV, and the enforcement proceedings which are specifically preserved until completion.

Textual examination, as well as examination of the clear historical model, thus make it plain that Congress did not propose to cut off the enforcement program but, in terminating "* * * all authority conferred * * *" by Title IV, referred only to the substantive authority to regulate wages.

There remains the question whether the physical termination of agencies created under Title IV would operate to defeat this power, a question which arises only by reason of the erroneous action of the court below. Absent the injunction, the enforcement proceeding herein would have been speedily completed under administrative schedules.

Section 717(b)(3) provides that agencies created under the Defense Production Act are to continue "in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency." Concededly, agencies such as the Wage Stabilization Board, created by Congress under Title IV of the Act, will go out of existence on or before October 31, 1953. To say this falls far short of saying that the power to administer the enforcement program must fail, whether or not complete, at that time. As already noted, the power to enforce is specifically vested, not in any agency

created by the Defense Production Act, but in the President and can be carried out by him directly or by delegation to any appropriate agency. In 1946, when the 1942 Act expired, similar authority as to enforcement against past wage violators was delegated to the Treasury Department, an agency whose existence was not dependent upon the expiring statute. There is no reason to believe that the President has any less authority under the 1950 Act. We will advise the Court, no later than October 31, 1953, as to the action taken by the President, in designating an agency which is to continue the wage enforcement proceedings to completion.[17]

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed and the permanent injunction vacated.

Respectfully submitted,

(S.) ROBERT L. STERN,
Acting Solicitor General.

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[17] Where, as here, a continuing power of enforcement is vested in the President, we doubt the necessity of precise Congressional direction as to the manner in which that power is to be implemented. That it is to be implemented is a necessary concomitant of the savings provision. The broad and continuing investigatory powers granted to the President by Section 705, 50 U.S.C. App. 2155, have importance principally by being viewed as ancillary to continuing powers of enforcement. And, aside from inference, Section 703(a), 50 U.S.C. App. 2153(a), expressly conveys to the President the widest latitude in implementing his power by delegation. It should be noticed that the power conferred upon the President by Section 703(a) was extended until June 30, 1955, by Section 11 of the Defense Production Act Amendments of 1953. 64 Stat. 798.

APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

Civil No. 5122

JONCO AIRCRAFT CORPORATION, PLAINTIFF

vs.

WALLACE C. FRANKLIN, JR., REGIONAL COUNSEL, WAGE STABILIZATION BOARD, REGION 10; JOSEPH A. JENKINS, CHIEF ENFORCEMENT ATTORNEY; T. D. STARNES, ENFORCEMENT COMMISSIONER, 315 WILSON BUILDING, DALLAS, TEXAS, DEFENDANTS

OPINION

HUTCHESON, *Chief United States Circuit Judge.*
ATWELL, *Chief United States District Judge.*
DAVIDSON, *United States District Judge.*

ATWELL, *Chief United States District Judge:*

The plaintiff is a Delaware corporation with its principal office in Shawnee, Oklahoma. The defendants are citizens of Dallas, Texas. More than $5,000.00 are involved, exclusive of interest and costs.

The plaintiff seeks relief from a threatened hearing before the defendant on complaint filed by the Wage Stabilization Board, alleging that it is not in compliance with the orders and statutes of the

United States. That a hearing by said Board, and the consequent penalties and punishments, for which the plaintiff has no legal remedy at law, make it imperative that such hearing be not held, and that a restraining order issue from this court.

After a careful analysis of the plaintiff's bill, the court concluded and called for the organizing of a three-judge court in accordance with the statute, and, thereupon, Senior United States Circuit Judge of the Fifth Circuit, was notified, and regulation notices were given to the Attorney General of the United States.

Such three-judge court heard the complaint, the answer thereto, and the arguments and testimony thereon, on Thursday, June 11th, 1953, and conclude that the temporary restraint should be made permanent.

The plaintiff is engaged in the manufacture of precision tools and parts for the aircraft industry, and its plant is in Shawnee, Oklahoma. It is the largest producer of its kind in the mid-west, operating under fifteen prime national defense contracts, which include a majority of principal manufacturers of military aircraft. In excess of 98% of its production is for the national defense.

The defendants assert the power, as shown under E.S.A. General Order No. 15, to disallow a prior and unauthorized alleged payroll of plaintiff as of November 24th, 1952, in the amount of $111,000.00, in addition to a total payroll of $575,000.00 for the period August 29, 1952 to February 2, 1953.

That such a burden and injury, because of the deprivation of Internal Revenue tax requirements and other penalties, fines, and indictments, the

plaintiffs sought court refuge. See Defense Production Act 1950, as amended, 66 Stat. 296, U.S.C. Title 50 app., Sec. 2061; also General Order No. 15. 17 Federal Register 2994. Treating of the disallowance of wage payments, even for the entire amount. That such determination "shall be final and not subject to review by the Tax Court of the United States, or, by any court in any civil proceeding. See also Bureau Internal Revenue ruling IT-4105, wherein it announces disallowance for tax purposes wage payments in amount certified to it by the economic stabilization agency. No provision is made for the review of such certifications by the Bureau of Internal Revenue."

The recital of the above is sufficient without going through the entire category, to show the seriousness of the penalties liable to be imposed upon the plaintiff.

The allegation is made that such Defense Production Act as amended, is unconstitutional.

See such cases as United States v. Butler, 297 U.S. 1; Bailey v. Drexel Furniture Co., 295 U.S. 20; United States v. Constantine, 296 U.S. 287; Lilly v. Commissioner of Internal Revenue, 343 U.S. 90, and National Life Ins. Co. v. United States, 277 U.S. 508.

Upon such questions as the delegation of legislative power, there is a line of decisions which classes it unconstitutional. See Carter v. Carter Coal Co., 298 U.S. 238; Panama Refining Co. v. Ryan, 293 U.S. 388. There are no standards with which the President could be guided in determining the policy, or, wishes of Congress.

An order of the Board is subject to review by the designated court, and only when sustained by the

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court may the order be enforced. Upon that review all questions of the jurisdiction of the Board and the regularity of its proceedings, all questions of constitutional right, or, statutory authority, are open to examination by the court. Jones & Laughlin vs. Labor Board, 301 U.S. 45. See also Stark v. Wickard, 321 U.S. 309; Social Security Board v. Nierotko, 327 U.S. 369; St. Joseph's Stockyards Co. v. United States, 298 U.S. 73. And these holdings support plaintiff's entrance here, and it is not obliged to pursue any so-called administrative remedy.

However, defendants contend that since the General Savings Statute, 1 U.S.C.A. 109, saves the liability for illegal wage payments made during the life of the Act, therefore, per force administrative enforcement continues. That statute is concerned only with the preservation of judicial proceedings. U. S. v. Hark, 49 F. Supp. 95, reversed on other grounds, 320 U.S. 531, 64 S. Ct. 359, 88 L. Ed. 290, rehear. den. 321 U.S. 802, 64 S. Ct. 517, 88 L. Ed. 1089; Rogers v. U. S., 158 F. 2d 835 (C.C.A. 6), reversed on other grounds, 332 U.S. 371, 68 S. Ct. 5, 92 L. Ed. 3.

It is also contended, and the contention seems to be correct, that the National Enforcement Commission has not been continued in existence by any executive order after April 30, 1953. The Complaint against the plaintiff was issued on April 1, 1953, by the Board which acted through defendant Franklin, and who still purports to act. However, there has been no Wage Stabilization Board since December, 1952, when its members resigned.

Quite recent decisions in this field may be found in Woodworth v. Kavanaugh, 102 F. (s) 9, affirmed

202 F. (2d) 154. Also in Aircraft and Diesel Equipment Corporation v. Hirsch, 331 U.S. 752, Mr. Justice Rutledge said, "* * * The presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed ministrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

Helpful also, in this interesting search for controlling authorities, are, Skinner & Eddy Corporation v. United States, 249 U.S. 557; Columbia Broadcasting System v. United States, 316 U.S. 407; Public Utilities Commission v. Fuel Gas Company, 317 U.S. 456; Miquel v. McCarl, 291 U.S. 442.

Likewise only a tripartite board, the members of which must be appointed by the President, by and with the advice and counsel of the Senate, as required by the Defense Production Act.

This is not a suit against the United States. The defendants cannot seek protection of their ultra vires acts by claiming that it is against the United States. Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682.

Quite recent cases by two three-judge statutory courts may be helpful. They are Grand Central Aircraft Co. v. Allen, et al, Northern District of California. Not yet reported. Also Dumbarton Bridge v. Norbeck, et al, Northern District of California, and Harold Peters v. Russell, Northern District of Illinois on May 21, 1953. Judge Holtzoff granted the same relief in Hoffman Machinery

Co. v. National Enforcement Commission, et al, on May 22, 1953.

The defendants concede that the entire violative payroll can be disallowed, and it is hardly logical for them to also assert that the amount of disallowance would be less than $10,000.00, or, that they would only disallow such amounts for tax purposes, and would not disallow such wage payments as items of costs under plaintiff's government contracts. They cannot assure us that other statutory and administrative penalties would not be invoked at some time in the future, because they have no control over decisions of the National Enforcement Commission.

The facts set forth in the affidavit of Paul Willis show that plaintiff will suffer irreparable damage. For an indefinite period plaintiff will be subjected to the possibility of a huge penalty in the form of a disallowance for tax purposes, and in computing costs under its government contracts.

In the case of Woodworth v. Kavanaugh, supra, plaintiff company received a determination on February 12, 1953, relating to its income tax liability for the years 1944 and 1945.

In addition, the Reconstruction Finance Corporation, and the participating bank, will call its loan a revolving credit fund from which plaintiff is making its weekly payrolls, and the Air Force under its non-procurement policy, to allow sub-contracts to be let only to financially sound companies, will direct that plaintiff receive no more sub-contracts for tooling and aircraft parts. These are realities and require relief.

From the foregoing it seems to us that irrepara-

ble injury will be suffered by the plaintiff if restraint is not granted and made permanent.

I dissent.

(S.) J. C. HUTCHESON, JR.,
Chief Judge United States Court of Appeals.

(S.) WM. H. ATWELL,
Chief Judge United States District Court.
(S.) T. WHITFIELD DAVIDSON,
United States District Judge.

(Jonco Aircraft Corp. v. Franklin, et al No. 5122 Civil)

HUTCHESON, C. J., Dissenting:

Of the clear opinion that the complaint in this case presents nothing more than a premature attack upon an administrative proceeding which is now only in its first stages, I cannot agree with the majority that a case for injunctive relief is made out. The Court of Appeals for the Fifth Circuit in Bradley Lumber Co. vs. N.L.R.B., 84 F(2) 97, thus correctly laid down the rule controlling here:

> "No doubt an investigation may, as the bill asserts, stir up some feeling among employees and cause some inconvenience by taking witnesses from their work, but these things are incident to every sort of trial and are part of the social burden of living under government. They are not the irreparable damage which equity will interfere to prevent; and a suit in equity would not wholly obviate them."

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In Volney Felt Mills, Inc. v. LeBus, we reaffirmed the rule there laid down, saying:

> "Appellant is not, as it claims, standing remediless, its constitutional rights invaded and taken away without affording it a judicial hearing. Its day in court will come, and soon, if it presses its available remedies. For that day it must, as all others similarly situated must, wait with such fortitude and patience as it can muster."

Cases from the Supreme Court supporting the same rule are Myers v. Bethlehem Corp., 303 U.S. 41; Aircraft & Diesel Equipment Corp. v. Hirsch, 331 U.S. 752.

I respectfully dissent.

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HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 323

WALLACE C. FRANKLIN, JR., Regional Counsel, Wage Stabilization Board, Region X; JOSEPH A. JENKINS, Chief Enforcement Attorney, Wage Stabilization Board, Region X; T. D. STARNES, Enforcement Commissioner, *Defendant-Appellants*

v.

JONCO AIRCRAFT CORPORATION, *Plaintiff-Appellee.*

PETITION FOR REHEARING AND STAY OF MANDATE

JOHN K. PICKENS
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Counsel for Petitioners
(Plaintiff-Appellee)

J. REX SPURR
Of Counsel

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

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WALLACE C. FRANKLIN, JR., Regional Counsel, Wage Stabilization Board, Region X; JOSEPH A. JENKINS, Chief Enforcement Attorney, Wage Stabilization Board, Region X; T. D. STARNES, Enforcement Commissioner, *Defendant-Appellants*

v.

JONCO AIRCRAFT CORPORATION, *Plaintiff-Appellee.*

PETITION FOR REHEARING AND STAY OF MANDATE

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States

Your petitioner, the plaintiff-appellee, respectfully requests that this Honorable Court reconsider its action of November 9, 1953, reversing the judgment of the three-judge United States District Court for the Northern Dis-

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trict of Texas; that the order then entered in this matter be vacated; that this matter be set down for oral argument; and that the mandate of this Court in this matter be stayed until rehearing be had.

Your petitioner, believing that the defendant-appellants possessed an appeal to this Court, as of right, from the decision of the three-judge court below did not oppose the assumption of jurisdiction of this matter by this Court. Jurisdiction in this matter was not noted by this Court prior to its per curiam opinion of November 9, 1953. Consequently, your petitioner did not file a brief or memorandum on the merits which would have pointed out numerous inaccuracies and errors both of fact and of law contained in the statement of jurisdiction filed on behalf of the United States. Such statement as to jurisdiction was in reality a brief on the merits. In fact, the Government adopted as its statement of points to be relied upon in its brief and on oral argument on the merits the assignment of errors contained in such statement as to jurisdiction. This Court rendered its decision of November 9, 1953 without the benefit of a brief, memorandum of law, or oral argument setting forth the position of plaintiff-appellee.

The consideration of this matter on the merits will show that this matter is not governed by the decisions of this Court in *Myers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41, or *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U.S. 237. Your petitioner has had no opportunity as yet to demonstrate that it possessed no statutory administrative remedy which it could pursue or exhaust.

It is respectfully submitted that petitioner should be accorded the opportunity to file a brief and present oral argument before it is foreclosed by an opinion of this Court reversing the decision of the three-judge statutory Court.

I.

PLAINTIFF-APPELLEE HAD NO VALID ADMINISTRATIVE REMEDY THAT IT COULD PURSUE OR EXHAUST

On the question of exhaustion of administrative remedy the factual situation in the case at bar is unique. It is one of novel impression that is not controlled by any present holding of this Court.

The Defense Production Act of 1950, as amended, (50 USC, App. 2016) contains no provision authorizing the issuance of an administrative enforcement complaint or the filing of an answer, the holding of an administrative hearing, or any procedure as to notice, service of process, right of counsel, taking of testimony, hearing of argument, issuance of an intermediate or proposed report, or any requirement as to findings of fact or the quantum of evidence required to sustain such a determination, or as to the certification or preservation of records. No right of judicial review is given; in fact, by regulation, the citizen is foreclosed from such a fundamental right.

The agency relies on the language contained in Section 405(b) of the Defense Production Act (50 USC App. 2105(b)) as granting it authority to hold administrative enforcement hearings as follows:

> "The President shall also *prescribe the extent to which any wage*, salary, or *compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments* and other governmental agencies *in determining the costs or expenses of any employer for the purposes of any other law or regulation.*"

This language, we submit, does not grant the agency any authority to issue complaints, hold hearings and make determinations as to how much of the total payroll shall be disregarded by the various governmental departments

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and agencies in determining the costs and expenses of an employer.[1]

No administrative procedure, for which violations of Wage Stabilization Rules and Regulations, is provided are authorized by any statute of Congress. Appellee has no valid administrative remedy which it can pursue, let alone one which it can exhaust.[2] Where administrative relief is

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[1] Where Congress intended to provide for administrative enforcement procedure, they have clearly set forth their intention in specific language as was done in the provisions of the National Labor Relations Act (29 U.S.C. 160), the Federal Trade Commission Act (15 U.S.C. 45(b)), the Public Utility Holding Company Act (15 U.S.C. 79k(b)), and others.

Section 9 of the National Labor Relations Act, as amended, grants that Agency power to conduct administrative hearing by the use of the following language:

> "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board * * * *shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board* * * at a place therein fixed, not less than five days after the serving of such complaint."

[2] That those administering the program during the period 1942-47, when Congress had made a formal declaration of war, had some constitutional doubts is illustrated by statements contained in the final report to the Secretary of Labor in December 1950. See the statement of Mr. Benjamin Aaron, former Executive Director, National War Labor Board at page 354 of Bulletin No. 1009 U. S. Department of Labor entitled "Problems and Policies of Dispute Settlement and Wage Stabilization During World War II" where he says

> "The very broad and practically undefined authority granted by the Stabilization Act to the President, not only to set up the stabilization rules but also to prescribe the penalties for violation, represented a departure from normal legislative practice. The further delegation of wide enforcement powers to the Board, as provided in the regulations of the Economic Stabilization Director, raised a specter of unconstitutionality which haunted some members of the Board's legal staff throughout the period in which the Stabilization Act was in force."

improbable or nugatory, equitable relief in the Federal Courts is appropriate even though statutory administrative remedies have not been exhausted. *Order of Railway Conductors* v. *Swan*, 329 U.S. 520.

Administrative enforcement proceedings are not authorized by the enabling statute. On the other hand, any administrative hearing held pursuant to administrative fiat would not be governed by the provisions of the Administrative Procedure Act as all functions exercised pursuant to the provisions of the Defense Production Act are specifically exempt therefrom.

The hearing officers of the National Enforcement Commission were assigned on a case-to-case basis. They were paid at a per-diem rate. They were thus subjected to the pressure of the purse, an evil which the principles of American jurisprudence have reviled since colonial times. If a hearing officer's initial decision displeased the agency in any way, it could result in the refusal of the Agency to assign any more cases for hearing before such officer. Such officers were bound by the interpretations, regulations and policies of the Wage Stabilization Board and the National Enforcement Commission.

These agencies were temporary in nature and had no history of fairness and orderly procedures. The very functions assigned to them and the broadness of the delegation made expediency the uppermost consideration. Their rules and regulations changed from day to day. No one can deny this. Although General Wage Stabilization Regulation Number 1, was promulgated on January 25, 1951, and all wages were frozen as of that date, the National Enforcement Commission was not established until July 1952. This Commission was composed of three members. It was not a part of Economic Stabilization Agency or Wage Stabilization Board as required by statute in this case. It was not tri-partite. Labor and industry had no representative on the agency engaged in administrative enforcement as required and as had been

the case in connection with the Stabilization Act of 1942 and its administration during and after World War II. During the short life of the National Enforcement Commission which covered some 13 months, the three positions on the Commission were held by at least eight different individuals. Its policies changed almost from day to day. There was no continuity of membership or policy. No opportunity existed for acquiring expertise that an administrative agency is supposed to possess.

II.

IF YOUR PETITIONER HAD AN ADMINISTRATIVE REMEDY TO EXHAUST, EVEN THOUGH INVALID AND UNCONSTITUTIONAL, SUCH REMEDY CEASED TO EXIST AFTER OCTOBER 31, 1953

Admittedly Title IV of the Defense Production Act provides that all authority under its provisions expire on April 30, 1953. At the hearing before the three-judge statutory court on June 11, 1953, your petitioner contended the power of these temporary agencies to proceed with administrative enforcement functions ceased as of April 30, 1953, if not before. That Court held in accordance with this view. The only authority by which these agencies contended they could carry on the hearing sought to be enjoined was the six months liquidation provision contained in Section 717 of that Act. The Government did not contend, at that time, that it possessed any authority beyond October 31, 1953.

However, now in their statement as to jurisdiction, the government contends that Executive Order Number 10494 continues such enforcement power even though it has long since ceased. They would have this Court believe that the same authority exists for the continuance and transfer of this power as did in 1947 when the President transferred the functions under the Emergency Price Control Act of 1942. This is not the fact. The First War Power Act was in existence and authorized the transfer of functions from

one agency to another. During the time the prior Act was in effect the United States was fighting a global war pursuant to a declaration of war by Congress. Congress has made no declaration of war during the period of the existence of the Defense Production Act of 1950. No constitutional basis for this legislation, its administrative procedure, or the extension thereof beyond October 31, 1953, has been asserted by the Government except some sort of vague inherent power which this Court held in *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, did not exist.

As this Court recognized in *Woods* v. *Cloyd W. Miller Co.*, 333 U.S. 138, 144, " * * * that if the war power can be used in days of peace to treat all the wounds that war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well."

Mr. Justice Jackson, concurring in a separate opinion, stated the same fear in even stronger language. He said at pages 146 and 147:

> "The Government asserts no constitutional basis for this legislation other than this vague, undefined and undefinable 'war power.'
>
> "No one will question that this power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is interpreted by the Judges under the influence of the same passions and pressures. Always, as in this case, the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.
>
> "Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care."

III.

THE FACTUAL SITUATION PRESENT HERE BRINGS THIS CASE WITHIN THE DECISION OF THIS COURT IN AIRCRAFT & DIESEL EQUIPMENT CORPORATION v. HIRSCH AND RELATED CASES

This situation is the type to which Mr. Justice Rutledge was referring in this opinion in *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, writing for this Court[3] in a unanimous decision, when he stated that

> "* * * the presence of constitutional questions, coupled with a sufficient showing of inadequacy of prescribed administrative relief and of threatened or impending irreparable injury flowing from delay incident to following the prescribed procedure, has been held sufficient to dispense with exhausting the administrative process before instituting judicial intervention."

It is well settled that where a statute, prohibiting an official from performing in a particular situation, is so clear as to be free from doubt as to what is prescribed, a court will enjoin a violation of the act even though the victim has not pursued his administrative remedies. *Miquel* v. *McCarl*, 291 U.S. 442, *Waite* v. *Macy*, 246 U.S. 606; *Roberts* v. *U.S.*, 176 U.S. 221, 229-31; *Farley* v. *U.S.*, 92 F. 2d 533; *Chambers* v. *Robertson*, 183 F. 2d 144, 146.

Where it is charged that an order or regulation of an administrative agency or official is void because the enabling act is unconstitutional or that the agency has exceeded the authority granted it by Congress, it is not necessary that administrative remedies be exhausted before invoking judicial process. *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218; *Public Utilities Commission* v. *Fuel Gas Co.*, 317 U.S. 456; *Columbia Broadcasting System* v. *United States*, 316 U.S. 407; *Skinner & Eddy Corporation*

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[3] See also *Fay* v. *Douds*, 172 F. 2d 720 (CA 2) Judge Learned Hand at p. 723.

v. *United States*, 249 U.S. 557[4] Cf. *Varney* v. *Warehime*, 147 F. 2d 238, 243 *cert. den.* 325 U.S. 882; *Chambers* v. *Robertson*, 183 F. 2d 144, 146 (1949), and *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498.

IV.

THE FACTUAL SITUATION PRESENT HERE PRECLUDES THE APPLICATION OF THE DOCTRINE OF MYERS v. BETHLEHEM SHIPBUILDING CORPORATION

We submit that many of the Federal Courts are either not following the authority of this Court or are wrongly interpreting many of the decisions of this Court since *Myers* v. *Bethlehem Shipbuilding Co.*, 303 U.S. 41. The doctrine of the exhaustion of administrative remedies of the *Myers case* is soundly bottomed on three considerations. These considerations are the necessity for orderly and uniform process, comity between the judicial and the administrative, and adequacy of the remedy at law. No one of these considerations is present here.

This is not a *Myers case* situation. In that case as Mr. Justice Brandeis is careful to point out Congress not only granted by statute sole authority to the National Labor Relations Board "to prevent any person from engaging in any unfair labor practices affecting commerce" but also provided for judicial review of the Board's orders exclusively in the United States Courts of Appeal.[5] The Justice emphasizes the fact that there is no claim that the statutory provisions or rules require anything other than a full and fair hearing and that the order of that Board is

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[4] The opinion in *Skinner and Eddy Corp.* v. *United States, supra,* was written for an unanimous court by Mr. Justice Brandeis, who also wrote the opinion in *Myers* v. *Bethlehem Shipbuilding Corp., supra,* on which the Government placed so much reliance.

[5] Assuming *arguendo* that the Wage Stabilization Board did possess administrative enforcement powers, such powers are not exclusive but existed concurrently with that of the Federal Courts. See section 706 of Defense Production Act of 1950 as amended (50 USC App. 2156(b)).

not self-enforcing as is the one at bar. In that case there was a complex question of jurisdiction. That question can only be determined upon a detailed factual background to be developed at a full hearing before the Board which, on the basis of its expertise, was given exclusive statutory power to decide.

However, its application by the lower federal courts has become so harsh and stringent that many state courts, who have previously followed general principles of administrative law of the federal courts, have refused to follow federal decisions.[6] Likewise, such interpretation has come under the fire of many outstanding writers on administrative law.[7]

In their statement of jurisdiction the defendant-appellants placed much reliance upon *MaCauley* v. *Waterman SS Company*, 327 U.S. 540, and *Aircraft & Diesel Equipment Corporation* v. *Hirsch*, 331 U.S. 752. As we have shown above, the language of this Court in the *Hirsch case* supports the citizen's position rather than that of the agency. The factual and legal situation in that case likewise support our position.

In the *Hirsch case, supra*, plaintiff Aircraft Corporation sought to litigate the constitutionality of the Renegotiation Act of 1947 by seeking to enjoin members of the Board handling recovery of excess profits from proceeding to prevent plaintiff's customers from paying $270,000 to

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[6] *Nolan* v. *Fitzpatrick*, 9 N.J. 477, 89 A 2d 13 (1952); *N.Y. Foreign Trade Zone Operators* v. *State Liquor Authority*, 285 N.Y. 272, 276, 34 N.E. 2d 316, 319.

[7] Stason, "Timing of Judicial Redress for Erroneous Administrative Action", 25 Minn. L. Rev. 560, 576 (1941); Netterville, "The Administrative Procedure Act: A Study in Interpretation," Geo. Washington L. Rev. 1 at 85-86 (1951); Bernard Schwartz "A Decade of Administrative Law: 1942-1951" 51 Michigan Law Review, 775 at 831-836 (1953). Administrative Law Bulletin, Administrative Law Section of American Bar Association, Vol. 5 No. 2 (April 1953) pp. 45-6. 1953 Annual Survey of American Law, 28 New York University Law Review, pp. 116-17. 1949 Annual Survey Am. L. 117.

plaintiff. The significant points of that case in relation to the case at bar can best be summarized as follows:

1. The ultimate ground for the denial of relief was that a suit against the prime contractor, in which the Government would be forced to intervene, was an adequate remedy at law.

2. No fine or penalty was involved, only the adjusted prices to be paid by a Government contractor under a subcontract.

3. Congress carefully considered the matter of review and, following determinations by the Secretary of War and the War Contracts Price Renegotiation Board, provided for a trial *de novo* in the Tax Court.

4. The Court explicitly reserved decision upon the question of the finality of the decision of the Tax Court in those matters.

Present in the *Hirsch case* was an immediately available alternative procedure before the ordinary courts; here there is an attempt to deny resort to the courts. *The Waterman case*, supra, (as well as the other decisions involving the Renegotiation Act) stands on the same footing as the *Hirsch case*. There a second immediate alternative was a trial *de novo* in the Tax Court which Congress declared to be the proper tribunal. Here we have an emergency creature born of administrative action, that has no permanence or tradition of due process, that purports to act under invalid and unconstitutional procedural regulations without the blessings of Congress.

CONCLUSION

WHEREFORE, for the foregoing reasons the plaintiff-appellee moves for a rehearing.

Petitioner's counsel certify that this petition is presented in good faith and not for the purpose of delay and that the petitioner is restricted to the grounds as stated above.

Respectfully submitted,

JERRY N. GRIFFIN

JOHN K. PICKENS
Attorneys for Petitioner
(Plaintiff-Appellee)

MOTION FOR STAY OF MANDATE

The petitioner moves that the mandate of this Court in this matter be stayed until rehearing is had.

By its attorneys

JERRY N. GRIFFIN

JOHN K. PICKENS

J. REX SPURR
Of Counsel

November 1953

APPENDIX A

Statutes Involved

50 USC App. 2105(b):

* * *

"No employer shall pay, and no employee shall receive, any wage, salary, or other compensation in contravention of any regulation or order promulgated by the President under this title. The President shall also prescribe the extent to which any wage, salary, or compensation payment made in contravention of any such regulation or order shall be disregarded by the executive departments and other governmental agencies in determining the costs or expenses of any employer for the purposes of any other law or regulation."

50 USC App. 2156(b):

* * *

"The district courts of the United States and the United States courts of any Territory or other place subject to the jurisdiction of the United States shall have jurisdiction of violations of this Act or any rule, regulation, order, or subpena thereunder, and of all civil actions under this Act to enforce any liability or duty created by, or to enjoin any violation of, this Act or any rule, regulation, order, or subpena thereunder. Any criminal proceeding on account of any such violation may be brought in any district in which any act, failure to act, or transaction constituting the violation occurred. Any such civil action may be brought in any such district or in the district in which the defendant resides or transacts business. Process in such cases, criminal or civil, may be served in any district wherein the defendant resides or transacts business or wherever the defendant may be found; the subpena for witnesses who are required to attend a court in any district in such case may run into any other district. The termination of the authority granted in any title or section of this Act, or of any rule, regulation, or order issued thereunder, shall not operate to defeat any suit, action, or prosecution, whether theretofore

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or thereafter commenced, with respect to any right, liability, or offense incurred or committed prior to the termination date of such title or of such rule, regulation, or order. No costs shall be assessed against the United States in any proceeding under this Act. All litigation arising under this Act or the regulations promulgated thereunder shall be under the supervision and control of the Attorney General."

50 USC App. 2166(a):

* * *

"Titles I, II, III, VI, and VII of this Act and all authority conferred thereunder shall terminate at the close of June 30, 1953; and titles IV and V of this Act and all authority conferred thereunder shall terminate at the close of April 30, 1953."

50 USC App. 2166(b)(3):

* * *

"Any agency created under this Act may be continued in existence for purposes of liquidation for not to exceed six months after the termination of the provision authorizing the creation of such agency."

APPENDIX B

Executive Order #10494

DISPOSITION OF FUNCTIONS REMAINING UNDER TITLE IV OF THE DEFENSE PRODUCTION ACT.

By virtue of the authority vested in me by the Constitution and laws of the United States, including the Defense Production Act of 1950, as amended (50 U.S.C. App. 2061 *et seq.*), hereinafter referred to as the Act, and as President of the United States and Commander in Chief of the armed forces of the United States, it is ordered that the functions remaining under Title IV of the Act shall be, and they are hereby, delegated as follows:

Section 1. *Fiscal liquidation.* Such functions as remain in connection with the fiscal liquidation of the Economic Stabilization Agency are hereby transferred to the Secretary of the Treasury.

Section 2. *Administrative proceedings.* The function of conducting administrative proceedings under Title IV of the Act, including the conclusion of those instituted pursuant to section 405 and the taking of necessary actions under sections 407 and 408 of the Act, is hereby transferred to the Director of the Office of Defense Mobilization.

Section 3. *Enforcement and investigations.* In addition to the functions now vested in the Attorney General by the Act, he shall have, and there are hereby transferred to him, the following-described functions under Title IV of the Act: (a) completing the processing of enforcement files, (b) concluding investigations where deemed appropriate, and (c) certifying disallowances (section 409(d)).

Sections 1 and 2 of this order shall become effective November 1, 1953. Section 3 shall become effective immediately.

DWIGHT D. EISENHOWER

THE WHITE HOUSE
October 14, 1953

Per Curiam Decisions.

No. 323. FRANKLIN, REGIONAL COUNSEL, WAGE STABILIZATION BOARD, ET AL. *v.* JONCO AIRCRAFT CORP. Appeal from the United States District Court for the Northern District of Texas. *Per Curiam:* The appellee having failed to exhaust its administrative remedy, the judgment is reversed. *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41; *Public Service Commission of Utah* v. *Wycoff Company, Inc.*, 344 U. S. 237, 246. *Acting Solicitor General Stern* for appellants. *Jerry N. Griffin* and *John K. Pickens* for appellee. Reported below: 114 F. Supp. 392.

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